UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DEBORAH A. MURPHY and CALVIN MURPHY	)	
Plaintiffs	)	
v.	)	**CIVIL NO. 00-117-B**
WAL-MART STORES, INC.,	)	
Defendant	)	

MEMORANDUM OF DECISION[1]

Plaintiffs Deborah and Calvin Murphy have filed a four-count complaint against Defendant Wal-Mart Stores, Inc., relating to a slip and fall incident that occurred on April 28, 1998, when Deborah Murphy was shopping in Defendant's Bangor, Maine store. The complaint asserts Deborah's claims for negligence, emotional distress, and punitive damages, as well as Calvin's claim for loss of consortium. Wal-Mart now moves for summary judgment, contending that the Murphys have not generated a triable issue of material fact concerning the notice of risk element in Deborah Murphy's negligence claim, and that the Murphys have failed to establish a prima facie case for either emotional distress or punitive damages. I now **GRANT** the motion.

SUMMARY JUDGMENT STANDARD

The Court views the record on summary judgment in the light most favorable to the non-movant. Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 50 (1st Cir. 2000). A party moving for summary judgment is entitled to a grant of summary judgment in its favor only

[1] Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Once the moving party has presented evidence of the absence of a genuine issue, the nonmoving party must demonstrate that the record evidence is sufficient to either establish or, at least, generate a genuine issue with respect to "every element essential to that party's case . . . on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The nonmoving party will have met this burden if that party can show that the evidence as to each element is undisputedly in that party's favor or is "sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side." Nat'l Amusements v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995).

FACTS[2]

On April 28, 1998, Deborah Murphy entered Wal-Mart's Bangor, Maine store, walked past the customer service desk on her left and merchandise displays on her right ("Action Alley"), turned right toward a shopping cart corral, stepped on something slippery, and fell to the floor. After Murphy fell to the floor she saw a miniature roll-on deodorant bottle and its roll-on ball lying separately on the floor. Murphy contends that the roll-on bottle was the source of a cream-like substance that she slipped on. Some of the cream substance Murphy slipped on was

[2] Pursuant to Local Rule 56(c), a party opposing a motion for summary judgment must submit with its opposition a statement of material facts that admits, denies or qualifies the factual statements contained in the moving party's statement of material facts by reference to each numbered paragraph. If the party opposing the motion for summary judgment fails to comply with this provision, the facts contained in the moving party's statement of material facts are deemed admitted, provided that they are supported by record citations. D. Me. Local R. 56. The Murphys failed to file a proper opposing statement of material facts and I have deemed Wal-Mart's factual statements to be admitted. However, the Murphys did file their own Statement of Facts, and to the extent those facts are not contrary to Wal-Mart's original statement of facts *and* are supported by record citations, I have included them in this summary.

located on her sneaker. After her fall, Wal-Mart personnel approached Murphy. They treated her courteously, offered to replace her sneakers, and told her to bring in any medical bills.[3]

The health and beauty aids section of the store, where deodorant is shelved, is not located in the vicinity of Action Alley. Action Alley is immediately adjacent to the location where Murphy fell. Action Alley is a high-traffic area. Wal-Mart's records indicate that several slip-and-fall incidents have occurred on the Bangor store's premises involving various products spilled or dropped on the floor in various locations. Wal-Mart instructs its employees to visually examine all areas of the store on a regular basis throughout the day and to dust or broom-sweep on a periodic basis. Wal-Mart's policies indicate that Action Alley deserves heightened vigilance insofar as slip and fall hazards are concerned. There is no indication that any Wal-Mart employee possessed knowledge, prior to Murphy's fall, that the deodorant bottle, the roller ball, or the bottle's contents were on the floor. Nor is there any indication how long these items were located on the floor.

DISCUSSION

Maine law governs the resolution of the substantive legal issues presented in this diversity action. Wal-Mart's motion essentially presents sufficiency of the evidence challenges to all of the Murphys' claims. I address them in turn.

1. Negligence

In a negligence action a plaintiff must establish "a duty on the part of the defendant toward the plaintiff, a breach of that duty, and an injury suffered by the plaintiff as a result of that breach." Gayer v. Bath Iron Works Corp., 687 A.2d 617, 621 (Me. 1996). Whether a duty exists is a question of law. Budzko v. One City Ctr. Assocs. Ltd. P'ship, 2001 ME 37, ¶ 10, ---

[3] Wal-Mart did not pay Murphy's medical bills.

A.2d ---, ---. "Whether a duty was breached and whether a defendant's conduct was reasonable under the circumstances are questions of fact for the jury." Id.

It is clear that Wal-Mart owed Murphy a duty of care. A business owner owes its invitees the duty to use ordinary care to ensure that the premises are reasonably safe, protecting against "all reasonably foreseeable dangers, in light of the totality of the circumstances." Baker v. Mid Maine Med. Ctr., 499 A.2d 464, 467 (Me. 1985). To succeed with a claim of negligence, however, the plaintiff must prove that the defendant had notice of the danger. Milliken v. City of Lewiston, 580 A.2d 151, 152 (Me. 1990). In the context of a danger arising from the presence of a foreign substance on the floor, notice of a danger may be attributed to the business owner if the owner: (1) caused the substance to be on the floor; (2) did not cause the substance to be on the floor but otherwise knew the substance was on the floor; (3) knew of a recurrent condition that created a risk that the substance would be on the floor; or (4) should have known the substance was on the floor because it lay on the floor for a period of time. Budzko, 2001 ME 37, ¶ 12, --- A.2d at ---.

Wal-Mart does not deny that it owed Murphy a duty of reasonable care concerning the removal of foreign substances located on the floor of its premises. Rather, Wal-Mart contends that the summary judgment record does not contain sufficient facts from which it may be inferred that Wal-Mart was on notice of the danger presented by the deodorant substance on the floor. I agree with this assessment of the record. First, there are no facts supporting the conclusion that Wal-Mart placed the deodorant on the floor. Second, there are no facts supporting the conclusion that Wal-Mart otherwise knew the deodorant was on the floor. Third, there are no facts indicating the existence of a recurrent condition from which constructive knowledge can be inferred. Fourth, and finally, there are no facts indicating that the deodorant

lay on the floor for a period of time long enough to permit a conclusion that Wal-Mart should have known of its presence.

Even Murphy acknowledges that there is no evidence that Wal-Mart had actual notice of the danger. Although she makes an attempt to argue that Wal-Mart had constructive knowledge of the substance on the floor, there are no facts which support the contention that the substance had been on the floor for any period of time. See, e.g., Abney v. Wal-Mart, 142 F.3d 431, 1998 WL 80183, 1998 U.S. App. LEXIS 16024 (6th Cir. February 18, 1998) (unpublished opinion) (observing that constructive notice is traditionally imputed by evidence that a spill has begun to dry). Instead, Murphy suggests that because Action Alley is "heavily traveled" and is an area Wal-Mart recognizes as deserving heightened vigilance for hazards, Wal-Mart had an obligation to take reasonable precautions to protect customers from injuring themselves at that location. In other words, Murphy argues that the placement of slippery items on the floor of Action Alley, by customers or employees, is itself a recurrent condition that Wal-Mart admittedly knew about and therefore had a duty to guard against. None of the cases cited by Murphy support such a contention. Recurrent condition cases in Maine have all involved more than the general awareness of a business proprietor that a hazardous condition may arise at some point in time on its premises. These cases all concern specific existing fixtures or other objects located on the premises, including naturally recurring phenomena such as ice, that have characteristics known to the proprietor to present unreasonably dangerous conditions to business invitees on an intermittent basis. See, e.g., Budzko, 2001 ME 37, --- A.2d --- (naturally recurring snow and ice hazard); Currier v. Toys 'R' Us, Inc., 680 A.2d 453 (Me. 1996) (customers tracking water onto ceramic tile floor in inclement weather); Dumont v. Shaw's Supermarkets, Inc., 664 A.2d 846, 847 & 848 (Me. 1995) (self-serve bulk candy display from which slippery items were dropped to

the floor); Hetzel v. Jewel Cos., 457 F.2d 527 (7th Cir. 1972) (meat counter from which liquids recurrently leaked to the floor); F. W. Woolworth Co. v. Moore, 48 N.E.2d 644 (Ind. 1943) (defective stair with raised metal strip that store employees observed over an extended period of time). See also Quarles v. Columbia Sussex Corp., 997 F. Supp. 327, 333-34 (E. D. N.Y. 1998) (holding that "general awareness" that liquid might be spilled on marble floor is legally insufficient to support a finding that owner had constructive notice of a specific condition that caused the plaintiff to slip and fall); Self v. Wal-Mart Stores, Inc., 885 F.2d 336 (6th Cir. 1989) (affirming summary judgment for defendant and remarking that jury cannot base a finding of constructive notice on pure speculation). Quite simply, the hustle and bustle of Action Alley and the existence of policies related to the monitoring of Action Alley do not reveal the existence of a dangerous "recurrent condition" in Wal-Mart's Bangor store. Without facts demonstrating that the deodorant lay on the floor for an extended period of time or that a hazardous recurrent condition existed in the store, there is no basis for a jury to conclude that Wal-Mart had constructive notice of the presence of the deodorant or that Wal-Mart breached a duty of care owed to Murphy.

Murphy is really attempting to establish breach of a duty of care based on allegations that Wal-Mart failed to follow its safety procedures on the day in question. Proof of these facts alone, without proof that Wal-Mart had notice of the specific hazard that resulted in Murphy's injury, would not comply with any of the four methods the Law Court currently recognizes for proving actual or constructive notice in slip and fall cases. Moreover, even if the mere failure to follow established safety procedures were legally adequate to establish negligence on its own, Plaintiff has not presented in her statement of material facts and her opposition to Defendant's

motion a single fact to suggest that Wal-Mart did not take reasonable precautions in this specific case.

Plaintiffs' assertions pertaining to lack of reasonable care are found in ¶¶ 14 – 22 of her statement of material facts. Those statements must be reviewed against the facts that she admits in Defendant's statement, including the facts that Wal-Mart trains its employees to always be on the lookout for hazardous materials on the floor (Defendant's Statement of Material Facts "DSMF" ¶ 8), that employees pass through the area of "action alley" regularly (DSMF ¶ 10), and that Wal-Mart employees are instructed to dust or broom-sweep periodically throughout the day and to visually examine their areas on a regular basis (DSMF ¶ 11). Plaintiffs' statement contains the following additional facts: (1) no employee has any memory of the incident; (2) there is no information that policies and procedures were followed on the day of the fall; and (3) neither of the Customer Service Managers knew where they were at the time of the incident. (Plaintiffs' Statement of Material Facts "PSMF" ¶¶ 14 –16). These contentions are not fully supported by the record references given. For instance, Plaintiffs support the assertion that neither Customer Service Manager knew "where they were at the time of the incident,"(PSMF ¶ 16), with Defendant's Answers to Interrogatories # 9 and #12. Neither the interrogatory questions nor answers make reference to the whereabouts of the Customer Service Managers.

Plaintiffs also cite to other slip and falls occurring both nationally and at the Bangor Wal-Mart store as evidence of negligence. However, there is no evidence that these other falls were substantially similar to the present case so as to be admissible under applicable Maine law. See Moody v. Haymarket Assocs., 1999 ME 17, ¶ 4, 723 A.2d 874, 875-76. Plaintiffs then proceed to list three other facts which they deem important to the issue of Wal-Mart's negligence: (1) Action Alley is a particularly "hazardous" area; (2) Wal-Mart knows there "needs to be"

improvement in the frequency and quality of the Safety Sweep Program; and (3) Wal-Mart does not use "spill magic stations" in Action Alley. The record references given in support of these contentions do not support the inferences contained within the statement of facts. Those record references, Exhibits 2, 3, and 4, do not describe Action Alley as particularly hazardous, they merely inform store personnel that when conducting periodic safety sweeps they should pay particular attention to Action Alley. Exhibit 4, at page 6, rather than suggesting that there "needs to be improvement" simply states that a solution to slip/trip/fall problems is to improve the frequency and quality of safety sweep programs. Furthermore, the presence or lack thereof of a "spill station" in Action Alley does not in any way relate to Plaintiffs' theory of the case, which is apparently that Wal-Mart should have done something to discover this spilled deodorant sooner. Plaintiffs want the factfinder to infer that because the deodorant was not detected prior to Murphy's fall, Wal-Mart must not have followed its safety sweep program or, if it did follow the program, that the measures the store undertook were deficient. There is no affirmative evidence cited in the record to suggest that Wal-Mart's safety sweep program at this store was deficient or that it was not followed on the date in question.

Thus, given the admitted fact that such a program was in effect, that employees had been instructed to be alert to potential dangers, and that there is no evidence that the deodorant was on the floor for any appreciable period of time or that the appearance of spilled health and beauty aids was a recurrent condition in Action Alley, Plaintiffs have simply generated no *facts* upon which a jury could base its determination that Wal-Mart did not exercise reasonable care to protect its customers from injury. If there were facts, such as a witness to testify that safety sweeps were actually not conducted at this Wal-Mart store despite policies to the contrary, then perhaps Plaintiffs' general negligence theory would be enough to get them to a jury. Those facts

are missing in this case. In the words of the Quarles court, "The Court commiserates with the injury plaintiff[s] suffered, however, although the laws of physics provide [that] for every action there is a reaction, the law of torts cannot recompense every slip and fall [in the absence of] negligence." Quarles, 997 F. Supp. at 334.

2. Emotional Distress

According to the Plaintiffs, Murphy's emotional distress claim may proceed based simply on the "cavalier manner in which [Wal-Mart] acts regarding the safety of its customers." A claim for emotional distress requires proof, *inter alia*, either of an underlying breach of a duty of care (negligent infliction claim) or an intentional or reckless act involving extreme and outrageous conduct (intentional infliction claim). Bryan v. Watchtower Bible & Tract Soc., 1999 ME 144, ¶¶ 25, 30 & 31, 738 A.2d 839, 847 & 848. Additionally, a plaintiff must prove serious emotional distress for either a negligent or intentional infliction claim. Holland v. Sebunya, 2000 ME 160, ¶ 18, 759 A.2d 205, 212. Because there is no underlying negligent act or extreme or outrageous conduct, Murphy's claim for emotional distress is groundless. Moreover, Plaintiffs' statement of material facts fails to establish the existence of severe emotional distress because it cites only to the complaint in support of damages, not to record evidence. D. Me. Local Rule 56.

3. Punitive Damages

Murphy bases her punitive damages claim on "the number of similar falls, both locally and nationwide, to prove malice." "Punitive damages" is not a claim but a remedy. To recover punitive damages a plaintiff must succeed on an underlying tort claim. Stull v. First Am. Title Ins. Co., 2000 ME 21, ¶ 14, 745 A.2d 975, 980. Punitive damages are available if the plaintiff can establish by clear and convincing evidence that the defendant's conduct was motivated by

actual ill will or was so outrageous that malice may be implied. Palleschi v. Palleschi, 1998 ME 3, ¶ 6, 704 A.2d 383, 385-86. Because Murphy's substantive claims are without merit and because there is no evidence of malice or outrageous conduct on Wal-Mart's part, Murphy is not entitled to punitive damages.

4. Loss of consortium

Wal-Mart does not challenge Calvin Murphy's claim for loss of consortium. For the sake of completeness, I address his claim anyway. A spouse's loss of consortium claim is an independent claim. Hardy v. St. Clair, 1999 ME 142, ¶ 11, 739 A.2d 368, 372 & n.6 (reserving question of "whether a loss of consortium claim may be subject to traditional common law or statutory defenses to the claims of the injured spouse"). Although the Law Court has reserved ruling on whether a loss of consortium claim is subject to those defenses applicable to the injured spouse's claims, it appears obvious to me that Wal-Mart cannot be liable to Calvin Murphy when it did not breach any duty of care owed to Deborah Murphy.

CONCLUSION

For the reasons stated in this memorandum of decision, I hereby **GRANT** the Defendant's motion for summary judgment.

So Ordered.

Dated this 13th day of March, 2001.

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Margaret J. Kravchuk
U.S. Magistrate Judge

U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 00-CV-117

MURPHY, et al v. WAL-MART STORES INC Filed: 06/09/00

Assigned to: MAG. JUDGE MARGARET J. KRAVCHUK ury demand: Defendant

Demand: $0,000 Nature of Suit: 360

Lead Docket: None Jurisdiction: Diversity

Dkt # in PENOBSCOT SUPERIOR : is CV-00-96

Cause: 28:1332 Diversity-Personal Injury

DEBORAH A MURPHY MARTHA J. HARRIS

plaintiff 947-0191

PAINE, LYNCH & HARRIS, P.A.

P. O. BOX 1451

BANGOR, ME 04402-1451

CALVIN MURPHY MARTHA J. HARRIS

plaintiff (See above)

v.

WAL-MART STORES INC DAVID C. KING

defendant 947-4501

RUDMAN & WINCHELL

84 HARLOW STREET

P.O. BOX 1401

BANGOR, ME 04401 (207) 947-4501